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## Finality of Appeal on Finds of Fact Found by the State Compensation Commissioner

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## STUDENT NOTES AND RECENT CASES

**FINALITY OF APPEAL ON FINDINGS OF FACT FOUND BY THE STATE COMPENSATION COMMISSIONER.**—In a recent West Virginia case, the commissioner made a finding of fact that an abscess, in applicants knee, giving rise to the disability for which compensation was claimed, was not caused by a bruise located just above applicants knee, which bruise was proved to have been received in the course of the employment, but that such disability was the result of a recurrence of an old trouble caused by a gun shot wound occurring twelve years before. Two doctors who had treated the applicant testified that in their opinion the abscess was a reappearance of the old trouble arising from shot embedded in the flesh and lodged against the bone of applicant's knee. They admitted the "mere possibility" of the concurrence of the bruise in causing the present trouble. The Supreme Court reviewed and reversed the finding of the commissioner, and ordered compensation to be paid. *Caldwell v. State Compensation Commissioner*, 144 S. E. 568 (W. Va. 1928).

The case therefore presents the question of the effect that will be given on appeal to findings of fact by the commissioner. It is to be noted that some workmens compensation acts such as that of Massachusetts, Gen. Laws, Mass. (1921) ch. 152 §11, specifically make the findings conclusive on appeal, while others like the West Virginia act, CODE, c. 15P §43, provide for appeals without designating the effect to be given, on appeal, to the commissioner's findings of fact. The court has interpreted the West Virginia statute as not denying the court the power to review the facts and that therefore it has such power. *Poccardi v. State Compensation Commissioner*, 79 W. Va. 684, 91 S. E. 663. Admitting, then, that the court has the power under the statute to review such findings, the question still remains whether it will do so in a given case, or whether it will take cognizance of questions of law only, as was said in *Poccardi v. Public Service Commission*, 75 W. Va. 542, 545, 84 S. E. 242, 243, L. R. A. 1916A 299. The court in refusing to reverse the finding of the commissioner has also held that generally the finding of the commissioner as to facts would be given the same effect as a finding of a judge or a verdict of a jury. *Poccardi v. State Compensation Commission*, *supra*.

It is generally said in the cases and by the text writers that in the absence of statutory provision on the point, the findings of fact, after a full hearing, will not be disturbed where they are supported by evidence, and where the evidence is conflicting the finding, like

the finding of a judge or the verdict of a jury, will be regarded as conclusive. *HONNOLD, WORKMEN'S COMPENSATION*, §242; Note in L. R. A. 1916A 266; *WORKMEN'S COMPENSATION ACTS*, 28 R. C. L. §116, and C. J. §127, *Poccardi v. Public Service Commission*, *supra*; *Kenniston v. Thames Towboat Company*, 89 Conn. 367, 94 Atl. 372; *Peoria Cordage Company v. Industrial Board*, 284 Ill. 90, 119 N. E. 996; *Mueller Construction Company v. Industrial Board*, 283 Ill. 148, 118 N. E. 1028; *Walker v. Industrial Accident Commission*, 177 Cal. 737, 171 Pac. 954; *Heitz v. Ruppert*, 218 N. Y. 148, 112 N. E. 750. Where the facts are undisputed, it is said, the question of whether or not the finding of the commissioner is supported by evidence, becomes on review a question of law. *Poccardi v. State Compensation Commissioner*, *supra*; *Radtko Brothers, etc., Company v. Rutzinski*, 174 Wis. 212, 183 N. W. 168; *Johnson v. A. C. White Lumber Company*, 37 Ida. 617, 217 Pac. 979. And an adverse adjudication of applicants claim may be revised and allowed on appeal. *Poccardi v. Ott*, 82 W. Va. 497, 96 S. E. 790.

It would seem that there was evidence here which reasonably would have supported the finding of the commissioner. But the court does not treat the case as one of conflicting evidence. It lays down the liberal rule that where the evidence is "undisputed" and where both favorable and unfavorable inferences may be drawn, such inferences should be resolved in favor of the applicant. This appears to be a follow-up of the rule established in *Poccardi v. Public Service Commission*, *supra*, where it was held that in the absence of conflict in the evidence adduced to show the claimants right to participation in the compensation fund, the commissioner is regarded in the appellate court as a demurrant to the evidence and if the evidence would sustain a verdict of a jury in favor of the claimant, the claim is regarded as sufficiently proved; and evidence, giving rise to inference consistent with the theory of liability and inconsistent therewith in equal degree, is sufficient to sustain applicants claim.

Does the case mean that the findings of the commissioner, although supported by some evidence, are not merely on that account, final? While the decision may be somewhat difficult to harmonize with the statement of the rule on this point as it is generally stated in the cases and texts, and while it may therefore indicate a tendency, (*Brightman's Case*, 220 Mass. 17, 107 N. E. 257; *International Harvester Company v. Industrial Commission*, 157 Wis. 167, 147 N. W. 53), on the part of the court to lean toward the theory of reviewability of such findings of fact, yet the case accords with "a spirit of liberality," in the administration of

the WORKMEN'S COMPENSATION ACT. Concurring Opinion of Maxwell, J., *Caldwell v. State Compensation Commissioner, supra, State v. District Court*, 131 Minn. 352, 155 N. W. 103, an attitude which, it is believed, is not at variance with the legislative intent, and will, on the whole, prove socially desirable.

—JOHN D. ALDERSON.

TORT — PHYSICIAN'S LIABILITY FOR ABANDONING PATIENT. — A physician undertook to care for a woman in childbirth, gave her medicine to stimulate delivery, and left saying that he would be back in a couple of hours. He failed to return when medical aid became necessary. The court held that he was liable in tort for the suffering caused the patient before another doctor could be procured and that it was no excuse that the physician was attending another woman in childbirth at the time and was unable to leave. *Young v. Jordan*, 145 S. E. 41 (W. Va. 1928).

As a general proposition where a physician has undertaken to care for a patient he becomes liable for the exercise of such skill and diligence as that of an ordinary, reasonably prudent physician in the same or similar circumstances. *Lawson v. Conaway*, 37 W. Va. 168, 16 S. E. 564; *Dye v. Corbin*, 59 W. Va. 266, 53 S. E. 147. Courts have uniformly held that the abandonment of a patient, who is in need of medical attention, without excuse or sufficient notice to enable him to procure another physician is actionable negligence. Some courts, as in the West Virginia case, therefore, have given damages in tort for malpractice upon such abandonment. *Barbour v. Martin*, 62 Maine 536; *Ritchey v. West*, 23 Ill. 329; *Gerken v. Plimpton*, 70 N. Y. S. 793; *Lawson v. Conaway, supra*; *Sinclair v. Brunson*, 212 Mich. 387, 180 N. W. 358. Other courts have held, where there was a contract of employment, actual or implied, that the abandonment was a breach of contract and have predicated liability upon that ground. *Hood v. Moffett*, 109 Miss. 757; 69 So. 664; *Ballou v. Prescott*, 64 Me. 305; *Lathrope v. Flood*, 135 Cal. 458, 67 Pac. 683.

Where the action is in tort the duty of care presumably arises from the fact that the physician has undertaken to care for the patient; he may not, therefore, abandon the case midway in its course. The situation is analogous to that in *Black v. Railway Company*, 193 Mass. 448, where the conductor on a train helped